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FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,)
FM Broadcast Stations)
(Milledgeville and)
Covington, Georgia))

MM Docket No.
RM-

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

JOINT OPPOSITION TO PETITION FOR RULE MAKING

Sapphire Broadcasting Inc. (formerly Emerald Broadcasting of the South, Inc.) ("Sapphire"), licensee and proposed assignor^{1/} of Station WHMA-FM, Anniston, Alabama, and WNNX License Investment Company, proposed assignee of WHMA-FM, (jointly "WHMA"), by their respective counsel, hereby submit their joint opposition to the "Petition for Rule Making" filed by Scotts Trail Radio, Inc. ("STRI"), assignee of Station WLRR(FM), Milledgeville, Georgia. ^{2/} This petition is predicated on the termination of MM Docket 89-585 which is in conflict. STRI argues that termination of that

^{1/} The application for assignment of license was filed on November 18, 1996 (BALH-961118GM) and is currently pending.

^{2/} STRI has filed a separate Motion to Dismiss Application for Review and to Terminate Proceeding in MM Docket 89-585. WHMA has filed a separate Opposition pleading to that Motion.

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proceeding is appropriate because the relocation of Station WHMA from Anniston, Alabama, to Sandy Springs, Georgia, is dependent upon Station WSSL-FM, Gray Court, South Carolina, downgrading its facility and an earlier authorization for WSSL to downgrade was cancelled. Based upon this cancellation, STRI believes that WSSL has abandoned its proposal to downgrade. As WHMA will demonstrate, STRI's assumption is wrong. WSSL has not abandoned its willingness to downgrade its facility in the context of this rule making proceeding and is not required to maintain a valid authorization on file in order for the Commission to consider the downgrading of WSSL's facility. As a result, STRI's petition is extremely late filed (by six years) as a counterproposal in the docketed proceeding and must await the final outcome of the MM Docket 89-585 before it can be filed.

BACKGROUND

1. The WHMA Application for Review has been pending since November 25, 1991. The case law and policy surrounding the issues raised in the Application for Review indicate a significant evolution in the Commission's approach to cases involving changes in communities of license to the point that such requests, even in Urbanized Areas, are seldom denied. WHMA believes that the Application for Review provides a compelling case for reversal of

the staff action. STRI has not questioned the merits of WHMA's proposal but only its current acceptability.

2. On February 12, 1990, the same day that Sapphire's predecessor filed its counterproposal in this proceeding, WSSL filed an application on Form 301 to downgrade its class of channel from 263C to 263C1 at a new transmitter site. The application would eliminate a short spacing to WHMA's counterproposal. This application was filed to demonstrate WSSL's willingness to downgrade at a future time should the Commission approve WHMA's relocation. WSSL had no interest independent of WHMA's proposal to downgrade its facility at a new site.

3. On November 9, 1990, the Commission issued a construction permit to WSSL. The facility was not constructed because the rule making was still pending. WSSL filed a Form 307 application restating its position that it does not plan to implement the permit until the Commission resolves MM Docket 89-585. Thereafter, WSSL restated this position in subsequent Form 307 applications on January 8, 1993, and June 7, 1993.^{3/} Finally, with the WHMA rule making proposal still pending, WSSL stopped filing Form 307 applications and the Commission cancelled the permit by letter of April 11, 1994.

^{3/} STRI refers to a license application having been filed for this facility (Motion at ¶3). The referenced license application was unrelated to the permit to downgrade WSSL.

DISCUSSION

4. WSSL expressed its willingness to downgrade and relocate to a new transmitter site by filing an application. But, it was not incumbent upon WSSL to file an application in order for it to express its willingness. See e.g., Earle, Pocohantas and Wilson, Arkansas and Como and New Albany, Mississippi, 10 FCC Rcd 8270 (1995).^{4/} Nor was it necessary for WSSL to continue filing Form 307 applications in order to inform the Commission that it continues to be willing to downgrade and move to a new site should the Commission grant WHMA's counterproposal. The fact that WSSL chose to file a Form 301 application on February 12, 1990, for this purpose in no way makes such filing the only form in which it must express its willingness. WSSL could simply have filed a one sentence statement of its willingness to downgrade as an attachment to WHMA's February 12, 1990, counterproposal and such statement would have been just as effective.

5. WSSL and WHMA believed that the Form 301 filing which is permissible would be a stronger expression of the willingness and

^{4/} In Earle, Arkansas, et al., the proposal to allot a new channel to Earle required a channel change (first adjacent) and site change at Pocohantas, Arkansas. The Pocohantas licensee provided a statement of consent to the site change and the Commission granted the Earle allotment. The Pocohantas licensee could have filed an application on the first adjacent channel for the new site during the rule making proceeding, but the Commission did not require such a filing in order to consider the licensee's consent to the change in site.

would expedite WHMA's move once it was granted. But, STRI is wrong in its belief that the filing of an application to downgrade was necessary and its later cancellation somehow indicated that WSSL was no longer willing to downgrade. WSSL simply got tired of incurring legal fees and filing fees every six months while the Commission has failed to act for over five years now. The fact remains that WSSL never retracted its willingness to downgrade. Nowhere does STRI point to a statement in this docket proceeding where WSSL says it is no longer willing to downgrade its facility.^{5/}

6. WSSL clearly reported in each of its filings that its willingness to construct at a new site was dependent on favorable action by the Commission in this proceeding. As stated, no such application filing by WSSL was necessary for the Commission to consider the WHMA counterproposal. Furthermore, WSSL never retracted its consent. For STRI's argument to prevail, every station that must either change site or downgrade in order for a rule making proposal to be considered must file an application, and if granted, must construct even if the rule making has not been

^{5/} WHMA has contacted WSSL for the purpose of providing an updated statement regarding its position. At this point, WSSL will need to negotiate with the WHMA buyer before it can make a definite commitment. The negotiations may need to await FCC approval of the WHMA assignment and its consummation. In view of the five-year delay by the Commission on WHMA's Application for Review, it would certainly be inappropriate for the Commission to act precipitously on the STRI petition

concluded. A consent statement would not be enough. Obviously under such circumstances, most stations would not do so.

7. Accordingly, STRI's petition is not acceptable for filing while the WHMA proposal remains under consideration. The Commission should immediately RETURN the petition.^{6/}

^{6/} It is interesting to note that the same station, WLRR, Milledgeville, Georgia, that STRI proposes to buy was granted an upgrade from Channel 264A to Channel 264C3 in MM Docket 89-547. But the licensee failed to file an application for the upgrade after the effective date of August 13, 1991, until the Commission wrote to the licensee nearly two years later at the urging of another station (in Perry, Georgia). The Commission imposed a new deadline on the Milledgeville licensee who finally filed but only after missing its second deadline. WLRR never built the Class C3 facility and the Commission cancelled the permit. Recently, on December 20, 1996, the Commission amended the FM Table of Allotments to downgrade WLRR to Channel 264A. Despite the Milledgeville station's failure to implement an upgrade on Channel 264C3, STRI sees no problem in giving that licensee (which is the same as giving itself) another chance at filing for a Class C3 facility even though (1) the licensee failed to file its application for nearly two years and only did so upon being threatened by the Commission, (2) another station (Perry, Georgia) was precluded from filing for an upgrade, and (3) the licensee never constructed and had its station's class revert back to its current Class A status. The Commission continued to give the Milledgeville station several additional chances because it had not affirmatively told the Commission that it had abandoned its proposal. Yet, STRI would require a different standard for WHMA and WSSL because WSSL failed to continue filing extension applications every six months. Obviously, STRI's idea of administrative fairness is completely one-sided.

Respectfully submitted,

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January 7, 1997

CERTIFICATE OF SERVICE

I, Veronica Abarre, a secretary in the law firm of Mullin, Rhyne and Topel, P.C., hereby certify that I have, on this 7th day of January, 1997, sent by first-class U.S. Mail, postage prepaid, copies of the foregoing "JOINT OPPOSITION TO PETITION FOR RULE MAKING" to the following:

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